

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

G. W. Brainard, as Trustee in Bank-
ruptcy of the Pacific Co-Operative
League Stores, Inc., Bankrupt,

Appellant,

vs.

San Diego Co-Operative Association,

Appellee.

OPENING BRIEF OF APPELLANT.

W. T. CRAIG,

JOSEPH KIRK,

NORMAN A. BAILIE,

Attorneys for Appellant.

No. 4104.

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INTRODUCTION.

The Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., two corporations, are in bankruptcy, the domiciliary trustee of the Pacific Co-operative League Stores, Inc. (G. W. Brainard, appellant herein), being located in San Francisco; Wm. H. Moore, Jr., being ancillary receiver in the Southern District of California, Southern Division.

Among the assets of the estate of said Pacific Co-operative League Stores, Inc., coming into the hands of said receiver were three grocery stores located in the city of San Diego, California. Prior to the filing of the petitions in bankruptcy hereinbefore referred to, and prior to the organization of the Pacific Co-operative League Stores, Inc., these three stores were in the possession of and were run under the name of Pacific Co-operative League, the other corporation hereinabove referred to. The Pacific Co-operative League transferred these stores to the Pacific Co-operative League Stores, Inc. Some time prior to the filing of the petitions in bankruptcy and the appointment of the ancillary receiver, these stores were attached by creditors of the Pacific Co-operative League Stores, Inc., and at the time of the appointment of the receiver they were in the possession of the sheriff under said attachment, and the receiver took them over from the sheriff.

After the appointment of said receiver and while he was in possession of said stores certain persons in San Diego designating themselves the San Diego Co-operative Association filed a petition and obtained an order to show cause on the receiver, said petition praying, among other things, that the ancillary receiver be directed to deliver to the petitioner, the San Diego Co-operative Association, said three stores.

The San Diego Co-operative Association is a voluntary association of individuals, which has not complied with the California statute in regard to fictitious partnerships.

The receiver filed an answer to the petition, and also on his own behalf filed a petition and obtained an order to show cause thereon directed to the San Diego Co-operative Association, said petition praying for an order to the effect that the San Diego Co-operative Association had no interest in said stores and that the said stores belonged to the estate of said bankrupt, Pacific Co-operative League Stores, Inc. The matter was referred to Glen H. Munkelt, Esq., as special master, and hearings were had before him. The special master filed a report and later filed his supplemental report in which he recommended among other things that an order be made directing the receiver to deliver said stores to the San Diego Co-operative Association. The report of the special master will be found on pages 22 to 51, inclusive, of the transcript. The ancillary receiver filed exceptions to the report of the special master, which exceptions will be found on pages 51 to 62, inclusive, of the transcript.

The report of the special master and the exceptions thereto were brought on for hearing before the Honorable Benjamin F. Bledsoe, judge of the United States District Court in and for the Southern District of California, and on the 8th day of December, 1922, Judge Bledsoe filed a memorandum opinion which will be found on pages 148 to 154, inclusive of the transcript, and also made an order affirming the special master's report and assessing on the receiver a penalty of five dollars for each exception or one hundred fifty dollars.

Thereafter, on stipulation and order of court thereon the trustee, G. W. Brainard, was substituted in said cause for the ancillary receiver and the appeal is being prosecuted in the name of the trustee.

On May 21, 1923, the trustee filed his assignment of errors, which assignment of errors will be found on pages 155 to 157, inclusive, of the transcript.

STATEMENT OF THE CASE.

The Pacific Co-operative League, as heretofore stated, was a California corporation, with a regular board of directors. Its principal place of business was in San Francisco.

In the latter part of 1919 or the early part of 1920 one Mr. Hadlon came to San Diego and interested various labor unions there in the proposition of opening up a store or stores. Later a Mr. A. A. Johnson, a representative of the Pacific Co-operative League, came to San Diego and began taking subscriptions for what was called "loan capital," and in that way, by these subscriptions, raised a considerable amount of money, said subscriptions being made by various *individuals* and not by any *organization*. These subscriptions were for \$50.00 each; \$10.00 of each subscription was to be used as "associate membership" in the Pacific Co-operative League, and was to be used for educational purposes, and \$40.00 was to be used for the purpose of establishing a store or stores in San Diego. Subscriptions were taken in the following form:

“PACIFIC CO-OPERATIVE LEAGUE, INC.

No. 1752.

236 Commercial St. San Francisco.

Affiliated with the National and International Co-Operatives.

I, the undersigned, in order to assist in the establishment of the Co-Operative Store (branch of Pacific Co-operative League) at San Diego, hereby subscribe the sum of \$. of which \$10.00 is for associate membership and the balance for: (State whether first payment on loan capital or new loan or installment) for investment by Pacific Co-operative League in said stores to be entitled to interest and privileges according to the by-laws.

I agree to pay of the above amount \$50.00 deposit with this application and the balance as follows:

Amount paid: \$50.00 Signed Chas. H. Peltcher.

Associate Member \$. . . . Address, Ocean Beach, S. D.

Loan Capital \$. . . . Received by A. G. Rogers,
A. Johnson.

Loan \$ San Francisco, Cal.

Total \$. Feb. 14, 1920.

The white copy is the member's official receipt. The blue copy must be returned to the central office with cash, check or deposit slip. The yellow copy must be retained by the local store or field representative.”

The payment of \$40.00 was evidenced by a certificate in the following form:

“Co-Operation

Producer Consumer

The link that binds.

PACIFIC CO-OPERATIVE LEAGUE, INC.

San Francisco, California.

Incorporated Oct. 13, 1913. Not operated for Profit.

Certificate of Loan Capital (Without Liability)

Received of George F. Gray the sum of forty & 00/100 dollars \$40.00 as loan capital. This loan capital is to be invested in the Pacific Co-operative League for the use of the Co-operative store at San Diego, Calif. in accordance with the by-laws of the Pacific Co-operative League.

(The holder hereby agrees that this certificate is liable to forfeiture in the event the holder becomes indebted to the Pacific Co-operative League.) PACIFIC CO-OPERATIVE LEAGUE SEAL. San Francisco, California.

PACIFIC CO-OPERATIVE LEAGUE,
Ernest O. F. Ames, President.

Attest: W. S. Huntington, Registrar.

Dated, San Francisco, Cal., Aug. 30, 1920."

It was understood that the subscribers to "loan capital" should receive five per cent interest on the loans, and as a matter of fact one payment of interest was made to the subscribers by the Pacific Co-operative League. They were also under the by-laws of the Pacific Co-operative League, entitled to receive a rebate from the local stores in proportion to the amount of goods purchased by them in said stores.

In all about 550 people subscribed for "loan capital." The money thus collected was placed in a bank in San Diego to the credit of the Pacific Co-operative League and by the Pacific Co-operative League withdrawn and placed in its general account in a bank in San Francisco. No subscriptions were made by the San Diego Co-operative Association as such. *All subscriptions were made by and as individuals.* The San Diego Co-operative Association in June, 1920, elected a board of directors, consisting of seven members. Later in

the summer of 1920 the local board of directors and Mr. A. A. Johnson, representative of the Pacific Co-operative League, opened negotiations for the purchase of three stores in San Diego from the Consumers Grocery Company, and entered into an agreement with said company, which will be found on pages 73 to 76, inclusive, of the transcript. This agreement, in order to be binding, had to be approved by the Pacific Co-operative League and it was so approved. A draft for \$1,000.00 was drawn by the San Diego Co-operative Association on the Pacific Co-operative League and the draft was paid.

Thereupon H. A. Floaten, a representative of the Pacific Co-operative League, came to San Diego, had an inventory taken and completed the deal, drawing drafts on the Pacific Co-operative League for the balance of the purchase price, except for a certain amount, approximately \$3,000.00, which was paid out of the proceeds of a special sale in the stores.

On September 1, 1920, the Consumers Grocery Company, from whom the stores were being purchased, caused to be executed and recorded in the office of the county recorder of the county of San Diego, a notice of intention to sell the stores herein involved to the *Pacific Co-operative League*. Thereafter, and on the 11th day of September, 1920, the Consumers Grocery Company executed to the Pacific Co-operative League a bill of sale in words and figures as follows, to-wit:

"Know All Men by These Presents:

That Consumers Grocery Co. (Inc.), 426 Market St., the parties of the first part, for and in consid-

eration of the sum of ten dollars of the United States of America, to us in hand paid by The Pacific Co-operative League (Inc.), the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey, unto the said parties of the second part, its executors, administrators and assigns, one Ford delivery car, and the furniture and fixtures and grocery stock located in stores at 426 Market St., 620 Fifth St., 1033 Broadway (this bill of sale void in case of failure of the Pacific Co-operative League to pay draft drawn on San Francisco this date.)

To have and to hold the same to the said parties of the second part, its executors, administrators and assigns forever.

And they do for their heirs, executors and administrators, covenant and agree to and with the said parties of the second part, its executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels, hereby made unto the said parties of the second part, its executors, administrators and assigns, against all and every person or persons, whomsoever, lawfully claiming or to claim the same.

Witness our hands and seal this 11th day of Sept. 1920.

CONSUMERS GROCERY Co.,
426 Market St.
Justin Hammond, Pres.

(Reverse side):

Bill of Sale.

Consumers Groc. Co. to Pacific Co-operative League.
Dated September 11th, 1920."

Thereupon the Pacific Co-operative League entered into the possession of the stores. The stores were insured in the name of the Pacific Co-operative League. The manager of the store was bonded to the Pacific Co-operative League. Employers' liability insurance was taken out in the name of the Pacific Co-operative League. The Pacific Co-operative League filed a tax statement with the tax assessor of San Diego county in its own name, and paid taxes on the stores. All goods were purchased in the name of the Pacific Co-operative League. The bank account at all times was carried in the name of the Pacific Co-operative League and checked out by its officers or employees, and at no time did the San Diego Co-operative Association or its board of directors or any of them, or any of its officers, have any right to check on the account of the Pacific Co-operative League.

The board of directors of the local association did not at any time assume or attempt to assume control of the stores.

Later and prior to the filing of the petition in bankruptcy the Pacific Co-operative League sold these stores, along with other assets, to the Pacific Co-operative League Stores, Inc., a California corporation, and approximately 275 holders of the "loan capital" certificates transferred their "loan capital" certificates and received in exchange therefor certificates of stock in the Pacific Co-operative League Stores, Inc.

All the persons who have furnished money or merchandise to either the Pacific Co-operative League or the Pacific Co-operative League Stores, Inc., are cred-

itors of these corporations. Credit was extended on the faith of the ownership of the stores by the two corporations above referred to. The legal title to the stores has at all times been in the Pacific Co-operative League or the Pacific Co-operative League Stores, Inc.

Notwithstanding all of these facts, the special master and the District Court found that the three stores were the property of the San Diego Co-operative Association and ordered the stores turned back to it, although *there is no evidence whatsoever to indicate that the San Diego Co-operative Association or any other association furnished any money whatsoever for the purchase of the stores, or ever claimed title to them until this litigation was commenced.*

The assignment of errors, which is found on pages 155 to 157, inclusive, of the transcript, is as follows:

Assignment of Errors.

I.

“That the United States District Court for the Southern District of California, Southern Division, ERRED in overruling the exceptions of Wm. H. Moore, Jr., ancillary receiver herein, to the report and recommendations of Glen H. Munkelt, special master.

II.

That said court ERRED in confirming the report and supplemental report of said special master.

III.

That said court ERRED in denying the prayer of the petition of said Wm. H. Moore, Jr., as ancillary receiver herein for an order to show cause against said San Diego Co-operative Association and in discharging the rule of the order to show cause issued on said petition, and dismissing said petition.

IV.

That said court ERRED in ordering that said Wm. H. Moore, Jr., as ancillary receiver herein had no interest in or right to the possession of the stock in trade, furniture, fixtures, equipment, books of account, and other personal property belonging to the three (3) grocery stores situated in the city of San Diego, state of California, and generally known as numbers 618 Fifth street, 426 Market street, and 1033 Broadway.

V.

That said court ERRED in finding and ordering that the title to said three (3) stores was vested in said San Diego Co-operative Association and not in said Pacific Co-operative League Stores, Inc., and its successor, G. W. Brainard, trustee in bankruptcy of said Pacific Co-operative League Stores, Inc.

VI.

That said court ERRED in ordering said Wm. H. Moore, Jr., as ancillary receiver herein, to deliver possession of said three (3) stores to the said San Diego Co-operative Association, and in ordering said receiver to account to said association for the money taken in and paid out by him in the conduct of the business of said stores during his receivership.

VII.

That said court ERRED in not sustaining the exceptions filed for and on behalf of said ancillary receiver to the report and supplemental report of said special master.

VIII.

That said court ERRED in not ordering and decreeing that the title to said three (3) grocery stores is vested in the trustee in bankruptcy of the estate of said Pacific Co-operative League Stores, Inc., bankrupt, and in not holding that said San Diego Co-operative Association has no right, title or interest in or to said stores, or any part thereof.

BRIEF OF THE ARGUMENT.

Counsel for appellant are at a loss to understand how either the special master or the District Court arrived at the conclusion that as against the trustee in bankruptcy the San Diego Co-operative Association, which paid not one dollar toward the purchase price of these stores or any of them and is not the assignee of any of the subscribers of "loan capital," can be held to be the owner of the stores.

Section 47 of the Bankruptcy Law as amended in 1910 provides that "Trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." In other words, the trustee in bankruptcy and his agent, the ancillary receiver, stand in the position of a creditor of the Pacific Co-operative League, or the Pacific Co-operative League Stores, Inc., who had levied an execution on these stores. As we have heretofore stated, there was recorded in the office of the county recorder of San Diego county on the first day of September, 1920 [Tr. p. 33, Special Master's Finding No. 13], a notice of intention to sell these stores to the Pacific Co-operative League; the money with which these stores were purchased had been collected in the name of the Pacific Co-operative League, deposited in a bank in San Diego in the name of the Pacific Co-operative League, transferred to San Francisco to the general account of the Pacific Co-operative League [Tr. p. 138], com-

mingled with all the other funds of the Pacific Co-operative League [Tr. p. 138] and paid out of that general fund. It is significant that the contract of sale entered into by the San Diego Co-operative League (whose name was later changed to the San Diego Co-operative Association) was subject to the approval of the Pacific Co-operative League. [Testimony of J. N. Bischoff, Tr. p. 114.] Mr. Bischoff testified as follows:

“The agreement is made out in the name of the San Diego Co-operative Association and at the bottom of it there appears a clause ‘subject to the approval of the Pacific Co-operative League.’ Mr. Hammond asked us if we had full power to execute the contract. Mr. Johnson and myself stated that it must have the approval of the Pacific Co-operative League before it was of any effect. Mr. Justin Hammond asked members of the board of directors if they had full power to execute an instrument of this kind, and the reply was made by Mr. A. A. Johnson and myself that the agreement must have the approval of the Pacific Co-operative League before it had any effect.

After the agreement was signed, it was forwarded to the Pacific Co-operative League at its headquarters in San Francisco. The Pacific Co-operative League affirmed the contract by telegram.”

Mr. Bischoff for practically the entire time was a member of the board of directors and president of the San Diego Co-operative Association.

At the time this contract was signed and at the time the above statement was made there were present Mr. Justin Hammond (president of the Consumers Gro-

cery Company, the seller), Mr. Kinard, representing Mr. Hammond, Mr. A. A. Johnson, representing the Pacific Co-operative League, and the following members of the board of directors of the San Diego Co-operative Association: Mr. Webster, Mr. Eason, Mr. Barnes and Mr. Bischoff, being four members out of seven of the board of directors of the local association. Thus at the very outset notice was brought to the local association through a majority of the board of directors (Mr. Bischoff was president and Mr. Eason was secretary) that the title to the stores was to be taken in the name of the Pacific Co-operative League. From the time when the preliminary contract was entered into, the entire transaction was carried on by Mr. H. A. Floaten, a representative of the Pacific Co-operative League. [Tr. pp. 129, 130, 131, 132.] The bill of sale went direct to the Pacific Co-operative League. [Tr. pp. 131-2.] The local manager was employed by the Pacific Co-operative League. [Testimony of H. A. Floaten, Tr. p. 133.]

The insurance policies were immediately assigned to the Pacific Co-operative League. [Tr. pp. 139-140.]

Compensation insurance on the employees was carried in the name of the Pacific Co-operative League and the manager was bonded to the Pacific Co-operative League. [Tr. p. 140, last paragraph.]

Taxes.

The Pacific Co-operative League paid the taxes on the stores. [Tr. p. 141.]

Interest on "Loan Capital."

The money to pay interest on the "loan capital" certificates was paid out of the general profits of the business of the Pacific Co-operative League and not out of the profits of the local group. [Testimony of H. H. Dobbs, Tr. p. 141.]

Operation of the Stores.

The stores were operated by the Pacific Co-operative League and later by the Pacific Co-operative League Stores, Inc., as above indicated, from the date of the bill of sale up to the time of attachment which was sometime prior to the filing of the petition in bankruptcy. The Pacific Co-operative League Stores, Inc., was adjudicated a bankrupt on the 22nd day of February, 1922, and the Pacific Co-operative League was adjudicated a bankrupt on or about the 15th day of March, 1922. [Tr. p. 146.]

Management.

As heretofore stated, the manager was employed by and bonded to the Pacific Co-operative League. [Testimony of Walter Huggins, Tr. p. 94.] The bank account was at all times under the control of the Pacific Co-operative League.

"At all times I signed the checks on instructions from San Francisco as manager of the Pacific Co-operative League. I furnished a fidelity bond as manager of the store. The bond was in favor of the Pacific Co-operative League in San Francisco.

I made daily reports to the Pacific Co-operative League in San Francisco of the business done in the San Diego stores. * * * I paid bills on instructions from San Francisco. Later they made a change and instructed me that all bills would be paid in San Francisco and not in San Diego except the small daily bills. Prior to that I paid the bills by checks of the Pacific Co-operative League signed by myself as manager. I never received instructions with regard to payment of bills from anyone except from the San Francisco office of the Pacific Co-operative League. The subject of my taking orders from the local board was never mentioned by the San Francisco office of the Pacific Co-operative League. The Pacific Co-operative League in San Francisco hired me and told me to come down and take charge of these stores and to make daily reports to them and make deposits in the bank in the name of the Pacific Co-operative League subject to my check as manager. *All bills which I received for goods purchased for the local stores on credit came to the Pacific Co-operative League.* [Testimony of Walter Huggins, Tr. pp. 94-95.]

Creditors.

All of the creditors are creditors of the Pacific Co-operative League or its successor, the Pacific Co-operative League Stores, Inc. [Testimony of Walter Huggins, Tr. pp. 96-97.]

“The Pacific Co-operative League owes money for goods delivered to the San Diego Stores, purchased during the time I was in charge of the stores. Some of these debts have not been paid. I do not know about the rest. I sent most of them to San Francisco when they asked for them a couple of months ago.

To my knowledge they have not been paid. I do not believe they have. I do not know if the creditors of the local stores have filed claims in the bankruptcy court.” [Testimony of Walter Huggins, Tr. pp. 96-97; see also, testimony of H. A. Floaten, Tr. pp. 133-134.]

Deposit of Moneys.

The local board of directors had knowledge that the funds were being handled in the name of the Pacific Co-operative League.

“My instructions to deposit the money coming from the store in the bank in San Diego and to draw checks against it came from San Francisco, from the office of the Pacific Co-operative League. *The president of the local board of directors was with me when I opened the account in the bank in San Diego.* It was upon instructions from the Pacific Co-operative League in San Francisco, I believe.” [Testimony of Walter Huggins, Tr. p. 97.]

The local board of directors knew that they had no control over the stores. [See testimony of J. N. Bischoff, Tr. pp. 115-116; testimony of Walter Barnes, Tr. p. 120; testimony of John S. Seibert, Tr. p. 123; testimony of Nora White Simpson, Tr. p. 127.] Bischoff, Barnes and Mrs. Simpson were all members of the board of directors of the local association.

“Loan Capital.”

As heretofore stated, the “loan capital” was nothing but a loan on which interest was paid. Even assuming, for the sake of argument, that the San Diego

Co-operative Association is a party interested in this litigation, and assuming this money was advanced by it (which is not the fact) still we contend that as against the Pacific Co-operative League and its successor, the Pacific Co-operative League Stores, Inc., it could not claim title to these stores. The "loan capital" certificate, which is the written evidence of the subscription, provides that the money is subscribed as "loan capital" to be invested in the Pacific Co-operative League for the use of the co-operative store at San Diego, California, in accordance with the by-laws of the Pacific Co-operative League. [Tr. p. 31.] Interest at the rate of five per cent was paid on these loans. [Testimony of Stanley M. Gue, Tr. p. 90; testimony of Chas. J. Eason, Tr. p. 80.]

But as heretofore stated, the "loan capital" was not subscribed by the respondent herein, but by 550 different individuals [testimony of J. N. Bischoff, p. 113], and there is no evidence that respondent in any way represents or has authority to act for these 550 individuals. As a matter of fact, 275 of the 550 subscribers to this "loan capital" converted their "loan capital" certificates into stock in the Pacific Co-operative League Stores, Inc. and most of them received their stock. [Testimony of Walter Barnes, p. 117.] It is, therefore, our contention that the San Diego Co-operative Association has no capacity to sue, and that it has no standing in court, but is simply attempting to perform a vicarious service for 550 individuals, who have in no way transferred what interest they have to it.

Legal Title.

The special master found "that at all times herein the Pacific Co-operative League has had the legal title to said three stores" [Tr. p. 50], and this finding was approved by the court along with all the rights or findings of the special master. It has been nowhere contended that the legal title to these stores ever was in any other person than the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., and that title passed by operation of law to the trustee, appellant herein.

Estoppel.

As heretofore stated in this brief, the three stores in question were owned and controlled from September 11, 1920, until about January, 1922, by the Pacific Co-operative League, and the Pacific Co-operative League Stores, Inc. During that time, as heretofore pointed out, credit was extended to the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., on the faith of their ownership of this property. The local association and its board of directors had knowledge at all times of what was going on and that credit was being extended to the Pacific Co-operative League—and now when bankruptcy ensues, after practically a year and a half of silence, with the legal title admittedly in the bankrupts, the San Diego Co-operative Association now comes into a court of equity and prays that it (not its members nor the subscribers to "loan capital") should be de-

clared to be the owner of these stores; and that the people, who on the faith and credit of the ownership of these stores by the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., have become creditors of these bankrupts, should be deprived of the assets upon which they have a right to rely for the payment of their claims, and that the San Diego Co-operative Association, respondent herein, should take these stores free and clear of any claim whatsoever. Surely they do not come into equity with clean hands.

In Corpus Juris, Volume 21, page 1060, it is stated:

“If a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist.”

See:

Wehrman v. Conklin, 155 U. S. 314;

U. S. v. West Side Irrigation Co., 230 Fed. 212.

It is a well-recognized principle that,

“He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent.” (*Harris v. American Bldg., etc., Assn.*, 122 Ala. 545, 554, 25 So. 220.)

“One having a right to property * * * must act with that degree of caution in making known his claim as will prevent others in ignorance of their rights from innocently making advances

upon the faith of it. If by his negligence men acting with ordinary prudence have in good faith obtained a right to the property, he cannot complain if he should be postponed to them." (Hughes v. McAlister, 15 Mo. 296, 55 Am. Dec. 143, 144.)

Vol. 21, Corpus Juris, p. 1156, section 158, reads as follows:

"Personal Property. Where one who owns or has an interest in personal property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of and been misled by his acquiescence. Actual presence of the owner at the time of the sale is not indispensable. And in the application of the rule it is of no consequence that there was no actual intention to mislead or injure anyone."

Volume 21, Corpus Juris, p. 1169, section 175, reads as follows:

"Negligence—In General. A recognized proposition as to estoppel *in pais* is that if in the transaction itself which is in dispute a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, he cannot be heard afterward as against that other to show that the state of facts referred to did not exist. Since in order to create

an equitable estoppel it is not necessary that there should be an intentional moral wrong, negligence, when there is a duty cast upon a person to disclose the truth, may supply the place of intent, where the effect of such negligence is to work a fraud on the party setting up the estoppel."

Volume 21, Corpus Juris, p. 1172, section 177, reads as follows:

"Clothing Another With Apparent Title or Authority—In General. Where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third persons are thus led into dealing with such apparent owner or person having such apparent power of disposition, they will be protected. However indisputable were the intentions of the owner not to surrender his ownership, when he has surrendered the possession and exhibited the person who has that possession to the world as one having the power to dispose of the property, he will not be heard against an honest buyer who acted upon the confidence imprudently reposed by the owner. In such cases the rights of such third persons do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

See:

Porter v. Johnson, 172 Cal. 456.

In *Morgan v. Chicago & Alton R. R. Co.*, 96 U. S. 743, the Supreme Court of the United States said:

“The appellee insists that the record discloses a case of estoppel *in pais* and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation.

“The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else would save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent.

“He is not permitted to deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed and who has acted accordingly upon that belief.

“The doctrine always presupposes error on the one side and fault or fraud upon the other and some difficulty of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.” (Citing *Merchants Bank v. State Bank*, 10 Wall. 604.)

While not in any way controlling, either on the District Court or on this court, the attention of the court is respectfully directed to the opinion of Judge Bean in a case arising out of this same bankruptcy, in the state of Oregon, the only difference between it and the case at bar being that in the Oregon case the actual possession of the store was in the hands of the local group at the time of the filing of the petition in bankruptcy, while in this case the stores were in the pos-

session of the receiver. Judge Bean's memorandum of opinion is so significant and seems to counsel so much in point that it is quoted herein in full, as follows:

"In the matter of the Pacific Co-operative League Stores, Inc., it seems that some years ago a California concern operating under the name of the Pacific Co-operative League proceeded to organize various branch stores in various parts of the northwest, and among other places in La Grande. Their plan was to induce local people to pay a \$10.00 fee for becoming a member of the league, joining the league, or becoming a member thereof, and to loan to it \$50.00, with the accumulations of which the league purchased or established a local store. This method was followed in La Grande and a store was purchased and thereafter operated by the Co-operative League.

Later, sometime in 1921, the Co-operative League found it convenient for various reasons to organize another corporation called the Pacific Co-operative League Stores and this latter corporation took over the business of the former store, and among others the La Grande store, and continued to operate it until the spring of 1922, when it became financially embarrassed. The local persons interested in the La Grande store learning of that fact, concluded to take possession of the store and did so, and transferred it, or attempted to transfer it, rather, to the respondents in this case, and they subsequently transferred it, or attempted to transfer it, to a local corporation organized by them at La Grande.

“A receiver was appointed in California for the Pacific Co-operative League Stores and in an ancillary proceeding a local receiver was appointed. He demanded possession of the La Grande store and it was refused. Thereupon he filed a petition for an order requiring the defendants to turn the store over to him and they refused to do so. Issue was joined and the matter referred to a master, who heard the testimony, reported the facts and recommended that the prayer of the receiver be granted.

“Now the principal contention of the defendants is first that the La Grande store belonged to them, individually, and not to the Co-operative League; but that is not supported by the testimony at all. It is true they furnished the money—a part of it, at least, and perhaps all of it—but the store was really managed and controlled by the California corporation; reports were made daily to it; it drew the checks in payment of the bills; purchased by its own check the store at La Grande and managed and controlled it.

“Then it is contended that because the second corporation, or the Pacific Co-operative League Stores, never complied with the laws of Oregon by filing its articles of incorporation and otherwise fulfilling the requirements of the statute governing foreign corporations, that it had no legal right to do business in Oregon. But if that is true—and probably it is—it does not seem to me that it would be any excuse or justification for these defendants taking possession of this store without right or authority, and therefore the findings of the special master in that case will be affirmed.”

Judge Bean's opinion was called to the attention of Judge Bledsoe and reference to it will be found in Judge Bledsoe's memorandum opinion on page 151 of the transcript.

Agency.

Respondent contended in its pleadings [see Tr. pp. 6, 8], and at the trial and the special master found [Tr. p. 46, Finding 5] that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association, respondent herein. The District Court in affirming the report of the special master also took the position that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association. Counsel for appellant contend that there is absolutely no evidence in the record upon which to base a finding of trusteeship or agency.

But, assuming for the sake of argument, that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association, nevertheless, it would not be entitled to an order directing the trustee in bankruptcy to deliver this personal property to it. The evidence from one end to the other shows that the San Diego Co-operative Association and the subscribers to the "loan capital" at all times had knowledge of the fact that these stores were being operated by the Pacific Co-operative League, and they must have known that debts were being contracted by said Pacific Co-operative League. Consequently, assuming respondent's own position, these debts were contracted by respondent's agent, with its knowledge

and with the knowledge of its members and on behalf of respondent, and the trustee in bankruptcy, standing as he does in the position of an attaching creditor attaching respondent's property for its own debt, certainly has a right to hold the property as against respondent.

We contend that the position taken by respondent herein, *viz.*: that it allowed the Pacific Co-operative League to operate and manage this property as its agent and accumulate debts, and then when catastrophe overtook the enterprise it has a right to claim the property as its own, free and clear of the debts created on its behalf, by its authorized agent, is a stench in the nostrils of any honest man, and should not be countenanced by a court of equity.

It is, therefore, respectfully submitted that the decision of the special master and the District Court should be reversed and an order made and entered herein decreeing that the three stores involved are the property of G. W. Brainard, trustee in bankruptcy of the Pacific Co-operative League Stores, Inc.; that the exceptions of the ancillary receiver to the special master's report should be sustained, and that the District Court should be declared to be in error, for all of the reasons set out in the assignment of errors herein.

Respectfully submitted,

W. T. CRAIG,

JOSEPH KIRK,

NORMAN A. BAILIE,

Attorneys for Appellant.

